

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

NELSON MOLINA-ACEVEDO [1],

Defendant.

CRIMINAL NO. 18-433 (DRD)

OPINION AND ORDER

"The visual display of a firearm is a crime under Puerto Rico law." United States v. Padilla-Colon, 578 F.3d 23, 25 (1st Cir. 2009)

Pending before the Court is the Defendant, Nelson Molina-Acevedo's *Motion to Suppress Evidence for Lack of Probable Cause in the Search Warrant and Request for a Hearing for Oral Arguments*. See Dkt. No. 26.¹ The Government filed its respective opposition thereto. See Dkt. No. 32. A *Reply* (Dkt. No. 36) and *Surreply* (Dkt. No. 37) were filed by the defendant and the Government, respectively. The defendant essentially argues "the search warrant lacks the elements of factual basis required and specificity to establish probable cause because it does not provide evidence about a crime." Dkt. No. 26 at 1. Thus, the Court should declare the search warrant object of the instant case void, and accordingly, suppress

¹ As no witnesses were going to be presented and all arguments related to the motion to suppress were sufficiently briefed by the parties, the Court found that a Suppression Hearing was not necessary. See Dkt. No. 39.

all evidence obtained as a result thereof, including the statements, as they are the fruit of the poisonous tree. See Id.

For the reasons stated herein, the Court **DENIES** the defendant's *Motion to Suppress*.

See Dkt. No. 26.

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 3, 2018, the defendant was arrested by the Puerto Rico Police Department (hereinafter, "PRPD") after a search warrant issued by a Puerto Rico Municipal Judge was executed upon his residence. On July 11, 2018, a District Court Grand Jury returned a Five-Count Indictment against the defendant, for possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A); possession with intent to distribute controlled substances, i.e. cocaine base "crack" and cocaine in violation of 21 U.S.C. § 841(a)(1); prohibited person in possession of firearm: convicted felon in violation of 18 U.S.C. § 922(g)(1)(a); and prohibited person in possession of firearm: drug user: unlawful user of a controlled substance as defined in 21 U.S.C. § 802 in violation of 18 U.S.C. § 922(g)(3). See Dkt. No. 8. The indictment further includes a forfeiture allegation. See Id.

As per the Government's version of facts, on June 21, 2018, Agent José Rivera Vélez of the PRPD Bureau of Drugs and Narcotics, spoke telephonically with a confidential informant (hereinafter, "CI"). See Dkt. No. 32. As the CI had previously provided information that resulted in seizure of drugs and firearms, Agent Rivera believed his source to be credible. Id. During said interview, the CI informed Agent Rivera that the defendant is also known as "Papo Cartucho" and the ward bully "el guapetón del barrio" while also providing the

defendant's legal name. Id. The CI informed Agent Rivera "he knows the defendant to be actively engaged in the sale of controlled substances; to be in possession of firearms at his house; to carry a pistol on his person; and to regularly fire shots into the air around the ward "el barrio"." Id. He requested for his identity to remain in anonymity as due to the defendant's actions and reputation, he fears for his and his family's life. Id. He described the defendant as being brown-skinned, approximately 5 feet 6 inches tall, and forty-five to forty-eight years old more or less. He further provided directions on how to arrive to his residence including physical descriptors such as color and style and the property's boundary enclosures.

Id.

On that same date, Agent Rivera notified the tip received to Sgt. Ángel Pérez Rosario, who after listening, ordered him to investigate the information. Accordingly, Agent Rivera went to the defendant's property to corroborate the information provided by the CI. Based on the directions provided by the CI, Agent Rivera located the property and found that it matched the description given to him by the CI. Once the residence was located, Sgt. Pérez ordered him to investigate and corroborate the information provided by the CI. Agent Rivera performed surveillances of the residence on June 22, 2018, with no findings. However, on June 25, 2018, Agent Rivera saw an individual who matched the description provided by the CI entering a Nissan Armada and driving away. Consequently, on June 26, 2018, Agent Rivera returned to the property and according to his Sworn Statement, observed the following events:

"At 2pm, approximately, I observed that the individual identified as Papo Cartucho got out from the residence under investigation, who was wearing a

blue shirt and a blue short. He got out through the gate [of] the residence under investigation and walked to the residence across, which is a two level concrete house painted in white, getting to the gray Nissan Armada, which was parked there. He opened its door and before getting on it, he drew a black firearm from his waist area and put it under the seat. Then he got on it and drove from the place, which is when I lost sight of him.”

Sworn Statement of Agent José Rivera Vélez 30548, Dkt. No. 32-1, p. 2. (Emphasis ours). As a result thereof, Sgt. Pérez was informed of Agent Rivera’s findings, who after hearing him, ordered the agent to obtain a search and seizure warrant for the residence, the vehicle and K/A Papo Cartucho.

Accordingly, on June 29, 2018, the *Search and Seizure Warrant* was issued by the commonwealth of Puerto Rico Municipal Judge as to the residence. See Dkt. No. 32-2. The warrant was executed on July 3, 2018 at approximately 6:00am. According to Agent Rivera, upon the arrival of PRPD agents to the residence, they knocked on the door and announced their presence. A female answered the door. They proceeded to conduct a security sweep of the location and found that in addition to the adult female, the defendant and two children were present at the residence. The PRPD agents provided a certified copy of the *Search and Seizure Warrant* to the defendant. Then, according to the agents, the defendant voluntarily said: “what I have is not in the house. It is outside.” See Dkt. No. 32 at 4.

The agents searched the house and found no contraband. However, as the defendant indicated that “what I have is not in the house” but in a small structure on the property and identified the structure by pointing at it, the PRPD agents searched said structure and seized two firearms, several ammunitions, and several controlled substances including marijuana, cocaine and crack cocaine. See Id. Upon said discovery, the defendant essentially stated that

his wife had nothing to do with it and he was the owner of everything. He was then advised of his Miranda rights, arrested and transported to the Narcotics office in Arecibo.

The PRPD assessed an ATF Task Force Officer (hereinafter, "TFO") of the arrest and further advised the TFO of the defendant's prior criminal history, including a conviction from a crime punishable by a term of imprisonment exceeding one year. The TFO provided the Miranda rights form to the defendant in Spanish and the defendant signed the form and agreed to speak. In essence, the defendant stated that:

"...the handgun is my property, I found the firearm in my grandfather's room after he died. I kept it for my protection. I bought the rifle for one-hundred dollars, United States currency. The serial number was obliterated when I purchased it. I own all of the narcotics found in the shack. I consume crack cocaine, marihuana, and cocaine. I have been using those substances since the age of sixteen, at least four to five times a day. The night before my arrest, I smoked marihuana mixed with crack cocaine."

Dkt. No. 32, p. 5.

The defendant is seeking the suppression of the evidence seized and statements rendered by the defendant as a result thereof, as he contends that an examination of the evidence received from the Government leads him to conclude the search warrant lacks the elements of factual basis required and specificity to establish probable cause because it does not provide evidence about a crime. See Dkt. No. 26. According to the defendant, the search warrant does not determine whether the person subject to the warrant can or cannot possess a firearm or whether the person has authorization or permit to carry a firearm, thus, lacks probable cause.

Whereas, the Government argues the motion to suppress should be denied for the following four (4) reasons,

"First, the Sworn Statement and Search and Seizure Warrant, there are sufficient facts to establish probable cause that a crime had been committed and that evidence of the crime would be found in the location to be searched. Second, the Search and Seizure Warrant should not be invalidated . . . by defendant's simply incorrect assertion that 'the visual display of a firearm is not a crime.'² Third, the information provided by the known and proven confidential informant was reliable and corroborated by Agent Rivera. Fourth, even if the Search and Seizure Warrant is facially insufficient, the exclusionary rule, as explained by Herring v. United States, 55 U.S. 135, 144 (2009), does not require suppression when applied to the facts of this case."

Proper analysis of the parties' motions requires careful scrutiny of the underlying legal framework.

II. LEGAL ANALYSIS

A. *Standing*

It is well settled that "the [Fourth] amendment's prohibition against unreasonable searches and seizures extends only to protect those places and interests in which the accused can be characterized as having a legitimate expectation of privacy." United States v. Cruz-Jimenez, 894 F.2d 1, 5 (1st Cir. 1990). In order to make such a demonstration, the defendant must show both a subjective expectation of privacy and that society accepts that expectation as objectively reasonable. United States v. Mancini, 8 F.3d 104, 107 (1st Cir. 1993). The defendant must demonstrate a privacy expectation in both the item seized and the place

² The defendant initially submitted that in Puerto Rico v. Nieves Cabán, 2016 WL 7033742 (P.R. Cir. Oct. 31, 2016) the Puerto Rico Court of Appeals held that individuals possessing a firearm very probably have a license. However, the Government raised an objection to the use of said decision as it was abrogated by the Court of Appeals on reconsideration. See Pueblo v. Nieves Cabán, 2017 WL 3842756 (P.R. Cir., June 6, 2017) aff'd, 2019 T.S.P.R. 33 (P.R. Feb. 20, 2019). Accordingly, the defendant did not renew his contention regarding this decision nor submitted a Certified English translation of the same. Thus, this argument will not be considered by the Court.

searched. United States v. Salvucci, 448 U.S. 83 (1980) ("[W]e must ... engage in a conscientious effort to apply the Fourth Amendment by asking not merely whether the defendant had a possessory interest in the items seized, but whether he had an expectation of privacy in the area searched.")(internal quotations omitted); United States v. Aguirre, 839 F.2d 854, 856 (1st Cir.1988)(“Before embarking upon the merits of a suppression challenge, a criminal defendant must show that he had a reasonable expectation of privacy in the area searched and in relation to the items seized.”).

As the Government did not contest the defendant’s standing to challenge the admission of illegal items seized from his own home, and the Court finds that in effect, the defendant has certainly met the requirements for standing, the Court needs not to proceed further as to this issue.

B. Probable Cause

The “probable cause” requirement stems of the Fourth Amendment which provides in its pertinent part that, “no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. Amend. IV. The Supreme Court has described “probable cause” as a “fair probability that contraband or evidence of a crime will be found in a particular place.” Illinois v. Gates, 462 U.S. 213, 238 (1983). “[T]he duty of a reviewing court is simply to ensure that the magistrate had a ‘substantial basis for ... conclud[ing]’ that probable cause existed. Id. at 23-39(citing Jones v. United States, supra, 362 U.S., at 271, 80 S.Ct., at 736). The First Circuit standard as to search warrants provides that “[a] warrant

application must demonstrate probable cause to believe that (1) a crime has been committed . . . and (2) enumerated evidence of the offense will be found at the place to be searched . . .” United States v. Feliz, 182 F.3d 82, 86 (1st Cir. 1999). “A finding of probable cause does not demand proof beyond a reasonable doubt. . . it demands proof sufficient to support a fair probability that a crime has been committed and that evidence of that crime is likely to be found within the objects to be searched.” United States v. Coombs, 857 F.3d 439, 446 (1st Cir. 2017)(Internal citations omitted).

“In assessing whether there was probable cause for a search, ‘[the First Circuit’s] task, like that of the . . . district court, is simply to make a practical, common-sense decision whether, given all the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place.’” United States v. Ramirez-Rivera, 800 F.3d 1, 27 (1st Cir. 2015)(quoting United States v. McLellan, 792 F.3d 200, 208 (1st Cir. 2015)). Thus, “[t]he government bears the burden of proving the lawfulness of the search.” United States v. Lopez, 380 F.3d 538, 543 (1st Cir. 2004).

In the case at bar, Agent Rivera received a tip from a CI who had previously provided information that resulted in seizure of drugs and firearms, hence, Agent Rivera believed his source to be credible. However, prior to seeking a Search and Seizure Warrant from a Magistrate Judge, Agent Rivera conducted a surveillance with the information provided by the CI to corroborate the information obtained. During his fourth day of surveillance, Agent Rivera saw the defendant exiting his property and entering his car, not without first removing a firearm from his waistband and placing it under the seat of his Nissan Armada.

Upon corroboration of the information provided by the CI, a Search and Seizure Warrant for the residence was requested by Agent Rivera. The Agent provided a Sworn Statement wherein the following relevant details were included, (1) the information provided by the CI (i.e.: physical description of the defendant, his name and nickname, approximate age, the fact that he sells drugs and has firearms at his house, he always carries a pistol, constantly fires shots around the ward, the specific directions to the defendant's property, and a detailed description of the defendant's house); (2) information about the surveillances conducted by Agent Rivera; and (3) information of Agent Rivera's findings on June 26, 2018, (i.e.: saw a man who fits the description provided by the CI, getting out of the residence and before getting on his Nissan Armanda, drawing a black firearm from his waist area to under the seat of the car). *Sworn Statement of Agent José Rivera Vélez*, Dkt. No. 32-1. Agent Rivera concluded that "according to the investigation on the dates 21, 22, 25 and 26 of June, 2018 during the afternoon . . . and according to [his] experience as investigative agent, there is no doubt that K/A Papo Cartucho . . . is using his residence to store a firearm (Black pistol)." Id. at p. 2. The Magistrate Judge ultimately found probable cause from the information provided by Agent Rivera and issued the Search and Seizure Warrant in search of a black pistol. See Dkt. No. 32-2, p. 3.

Upon a careful review of the information provided by the CI and the surveillance conducted by Agent Rivera, which corroborates the defendant's possession of a weapon, the Court finds there was probable cause that contraband would be found at the defendant's residence. Agent Rivera's surveillance confirmed that an individual who fits the description

provided by the CI exited his residence with a weapon on his waistband and ultimately placed it under his seat prior to leaving the premises. Said finding objectively corroborates the tip that the defendant, as a matter of fact, had a weapon at his residence. More importantly, the warrant was supported by Agent Rivera's sworn statement which described in detail the place, person and things to be seized pursuant to the Fourth Amendment. Thus, the Court finds that the probable cause standard in the instant case has been met.

As the defendant provided voluntary post-arrest statements and consented to the search of the motor vehicle and cell phone, after being advised of his Miranda rights, the Court finds the consented search of the defendant's cell phone and motor vehicle as well as his post-arrest statements were not "fruit of the poisonous tree."

C. *Confidential Informant's Reliability*

"Where the primary basis for a probable cause determination is information provided by a confidential informant, the affidavit must provide some information from which a magistrate can credit the informant's credibility." United States v. Gifford, 727 F.3d 92, 99 (1st Cir. 2013). In assessing the confidential informant's credibility, the First Circuit has enumerated following factors to be considered, "(1) the probable veracity and basis of knowledge of the informant; (2) whether an informant's statements reflect first-hand knowledge; (3) whether some or all of the informant's factual statements were corroborated wherever reasonable and practicable; and (4) whether a law enforcement officer assessed, from his professional standpoint, experience, and expertise, the probable significance of the

informant's information." United States v. Gonsalves, 859 F.3d 95, 104 (1st Cir. 2017)(citing Ramirez-Rivera, 800 F.3d at 137).

In fact, "a probable cause finding may be based on an informant's tip so long as the probability of a lying or inaccurate informer has been sufficiently reduced." United States v. Greenburg, 410 F.3d 63, 69 (1st Cir. 2005). Notably, "an informant's tip can establish probable cause even though the affidavit does not contain information about the informant's past reliability." Id. at 67. Rather, "[t]he judgment to be made is: when does verification of part of the informant's story make it sufficiently likely that the crucial part of the informant's story (i.e., allegations that criminal activity has occurred and that evidence pertaining thereto will be found in the location to be searched) is true, such as would 'warrant a [person] of reasonable caution in the belief' that [a search would be] appropriate," based upon what the informant has said?" United States v. Khounsavanh, 113 F.3d 279, 284 (1st Cir. 1997)(citing Terry v. Ohio, 392 U.S., 1, 21-22 (1968). Moreover, the First Circuit has specifically held that "mutual corroboration . . . [between accounts] serve[s] to bolster the reliability of the information provided by each of them." United States v. Monell, 801 F.3d 34, 39 (1st Cir. 2015).

As to the validity of the confidential informant's credibility, Agent Rivera stated under oath that "he interviewed an informant he knows, because he has previously given information about traffic of drug and firearms which resulted in the seizure for drugs and firearms." Dkt. No. 32-2, p. 1. Agent Rivera subsequently conducted a surveillance to the residence, using the information provided by the CI in order to corroborate his source. He

confirmed the physical description of the defendant, the description of the house, the directions to get to the house, and the fact that the defendant was carrying a gun when exiting the residence. Id.³

When applying the requirements set forth by the First Circuit when assessing the CI's credibility, the Court finds that all requirements were met. The Court briefly explains. As to the "probable veracity and basis of knowledge of the informant", the Court finds that Agent Rivera was sufficiently detailed in the reasons for relying on the CI's information and the basis of his knowledge as the Agent stated the CI had previously provided him information that led to seizures of drugs and firearms. The CI's statements certainly reflected "first-hand knowledge" as he was able to identify the defendant by his name and nickname, he was further able to describe in detail his physical appearance, the directions towards the defendant's residence and gave a detailed description of the residence and alleged criminal activity. As to the corroboration of "some or all of the informant's factual statements", Agent Rivera was able to corroborate the fact that the defendant had firearms in his house, as previously informed by the CI. Finally, as to whether Agent Rivera "assessed, from his professional standpoint, experience, and expertise, the probable significance of the informant's information" the Agent discussed the information received with Sgt. Pérez-

³ "This person states that has a confidential information about an individual known as Papo Cartucho, about 5'6" of height approx., brown skinned, about 45 to 48 years of age, who sells drugs and has firearms at his house, he always carries a pistol, and constantly fires shots into the air around the barrio. The informant gives this information provided that his identity is kept anonymous, because he fears for his life and his family's, since this person is known as the brawler of the barrio. He tells that in the town of Arecibo, in the Biafara sector, at the PR-637, kilometer 1.6, you enter a by-road and when you pass the curve in the first house to the left—which is a two level house, painted in white with pink pretil, French style windows in white and which has a concrete fence that has not been plastered with a white iron gate—there lives an individual known as Papo Cartucho and his name is Nelson Molina Acevedo, who sells drugs and has many firearms in the house."

Rosario, and subsequently conducted his own corroborative surveillance which resulted in ultimately confirming the information provided as to the firearm by the CI.

Consequently, the Court finds the information provided by Agent Rivera as to the CI's credibility was sufficient, and according to the applicable stringent standard, and furthermore, the CI's tip was sufficiently corroborated by Agent Rivera. Hence, the Magistrate Judge had two mutual corroborative accounts that led to the conclusion there was a fair probability that a crime had been committed and that evidence of that crime was likely to be found within the objects to be searched. See Coombs, 857 F.3d at 446.

D. *Second Amendment Right to Bear Arms*

The Second Amendment provides in its pertinent part that, "the right of the people to keep and bear arms, shall not be infringed." U.S. Const. Amend. II. In fact, the Supreme Court has held that carrying and possessing a firearm is not a privilege, but a fundamental right pursuant to the Second Amendment. See District of Columbia v. Heller, 554 U.S. 570 (2008); see also McDonald v. City of Chicago, 561 U.S. 742 (2010). However, "the right secured by the Second Amendment is not unlimited." Heller, 554 U.S. at 626. In turn, the Supreme Court has emphasized the validity of the longstanding prohibitions on the possession of firearms as to "felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." Id. To that effect, the Supreme Court held that "the [Second Amendment] right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Id. "Thus, [the Supreme Court] do[es] not read the

Second Amendment to protect the right of citizens to carry arms for any sort of confrontation.” Id. at 594.

Whereas, in Puerto Rico, “firearms may be borne, carried, and transported in a hidden or unconstructive manner . . .” P.R. Laws Ann. tit. 25 § 456a(d)(1)(emphasis ours). Accordingly, the First Circuit has validated that, “[t]he visual display of a firearm is a crime under Puerto Rico law. United States v. Padilla-Colon, 578 F.3d 23, 25 (1st Cir. 2009). In fact, as “Puerto Rico is a concealed-carry jurisdiction . . . an individual must carry a firearm in a concealed manner even if he or she possesses a license to carry the firearm.” United States v. Aviles-Vega, 783 F.3d 69, 73 (1st Cir. 2015)(internal citations omitted). By the same token, the Puerto Rico Supreme Court has held on numerous occasions that,

“[I]n cases of unlawful carrying or possession of firearms, the prosecuting attorney is not bound to prove that defendant had no license, when the fact has been alleged in the information and the carrying and possession of the weapon has been proved, since in those cases the presumption of illegal carrying or possession arises, and it is incumbent upon defendant to adduce evidence to overcome that presumption.”

People v. Castillo, 1962 PR Sup. LEXIS 338; see Dkt. No. 32-3. (Emphasis ours).

The defendant argues that “contrary to the circumstances in 1982, it is very probable that a person carrying a firearm has a license to carry the firearm.” Dkt. No. 26 at 4. Thus, the defendant’s public display of a firearm is insufficient to conclude that he was engaging in a criminal activity, hence, there was no probable cause to request a Search and Seizure Warrant. The Court disagrees and explains.

As correctly asserted by the Government, Puerto Rico is a “concealed-carry” jurisdiction. As such, the visual display of a firearm is a crime under Puerto Rico law. Although

the Court recognizes that the Second Amendment guarantees an individual's right to bear arms, said right is not unlimited. Most critical, the defendant sustains his allegations, partly on Heller, which deals with the possession of a firearm inside the residence by law-abiding citizens. During Agent Rivera's surveillance, he saw the defendant visually displaying the firearm outside of his residence, which directly contravenes with Puerto Rico law that specifically provides that "firearms may be borne, carried, and transported in a hidden or unconstructive manner. . ." P.R. Laws Ann. tit. 25 § 456a(d)(1)(emphasis ours).⁴ More importantly, the information provided by the CI, is sufficient information to demonstrate that the actions of the defendant are not from a law-abiding citizen (i.e.: "sells drugs and has firearms at his house, he always carries a pistol, and constantly fires shots into the air around the *barrio*"). Thus, the defendant is certainly not part of the class that is protected by the Second Amendment.

As the Court finds that there was probable cause for the Search and Seizure Warrant to be issued and executed, the Court needs not to enter into the applicability of the exclusionary rule as to the instant motion to suppress.

VI. CONCLUSION

The Court finds the defendant failed to demonstrate lack of probable cause to issue and execute the Search and Seizure Warrant subject of the instant case pursuant to

⁴ The defendant further relies on Puerto Rico Court of Appeals decision on Pueblo v. Rodríguez López, 2017 WL 3880520 (TCA) to sustain his allegation that "citizens have the fundamental right to possess and carry firearms" while submitting that the Court of Appeals declared article 5.04 of the Puerto Rico Firearms Law unconstitutional. See Dkt. No. 43. However, the Court cannot consider the Puerto Rico Court of Appeals' decision as the instant controversy is solely based on Art. 2.02 of the Puerto Rico Firearms Law. See P.R. Laws Ann. tit. 25 § 456a(d)(1), which was the basis of the defendant's motion to suppress in the first place.

supporting documentation and applicable law. Accordingly, the Court hereby **DENIES** the defendant's Motion to Suppress (Dkt. No. 26) all items seized, his post arrest statement and voluntary consent to search his motor vehicle and cellphone.

IT IS SO ORDERED.

In San Juan, Puerto Rico, on this 24th day of April, 2019.

S/Daniel R. Domínguez
Daniel R. Domínguez
United States District Judge